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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1948

298

No. 298

DEFENSE SUPPLIES CORPORATION, and RECONSTRUCTION FINANCE CORPORATION,

Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW, and CLYDE W. HENRY,

Respondents.

BRIEF FOR RESPONDENT, LAWRENCE WAREHOUSE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF FOR RESPONDENT, LAWRENCE WAREHOUSE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The original action was brought by petitioner, Defense Supplies Corporation, a corporation created by and organized under an Act of Congress, against respondents for the alleged negligent destruction of

property by fire. The complaint was filed February 16, 1944, and the submission of evidence concluded on February 15, 1945. On July 1, 1945 Defense Supplies Corporation was dissolved by Congress by the Joint Resolution of June 30, 1945 (c. 215, 59 Stat. 310). Thereafter counsel appearing in the name of Defense Supplies Corporation, without apprising Court or counsel of the dissolution, filed a brief in the trial Court, and the matter was ordered submitted on July 16, 1945. On January 9, 1946 the trial Court ordered judgment for plaintiff, and counsel appearing in the name of Defense Supplies Corporation prepared findings and argued upon settlement thereof. On April 15, 1946, judgment was entered and after respondents' motion for a new trial was denied, respondents appealed. Additionally, counsel appearing in the name of Defense Supplies Corporation appealed against the judgment in favor of respondent Henry. The appeals were briefed and argued in the Court of Appeals for the Ninth Circuit, which affirmed the judgment on December 5, 1947, and denied petitions for rehearing on January 2, 1948.

During the period after July 1, 1945, counsel appearing in the name of Defense Supplies Corporation continued to act for the dissolved and non-existent corporation without ever advising the Court or counsel of that fact, of which they were admittedly aware. (R. p. 398.) On February 17, 1948, respondents Lawrence Warehouse Company and Capitol Chevrolet Company, for the first time discovering the fact of dissolution of the corporate plaintiff, filed their mo-

tion in the Court of Appeals for the Ninth Circuit to vacate its decision, reconsider the matter and remand it to the District Court with instructions to dismiss the action as abated. (R. pp. 386-389.) This motion was argued and submitted on memorandums on February 24, 1948. (R. p. 390.)

Thereafter, on March 2, 1948, a motion was filed in the name of Defense Supplies Corporation and Reconstruction Finance Corporation for an order amending the pleadings by substituting Reconstruction Finance Corporation as plaintiff. (R. pp. 392-393.) This motion was ordered submitted on March 8, 1948 (R. p. 394), and on April 6, 1948, the Court of Appeals denied the motion for an order amending the pleadings and granted respondents' motion, vacating the decision and remanding the case to the District Court for dismissal as abated. (R. pp. 395-427.) Petitions for rehearing were denied on May 13, 1948, and the opinion amended. (R. p. 428.)

It is to be noted that petitioner Defense Supplies Corporation has had no existence since July 1, 1945, and that petitioner Reconstruction Finance Corporation is not now, and never has been, a party to the action, and has never moved for substitution or intervention therein, except in the motion "to amend the pleadings" which was denied on April 6, 1948.

JURISDICTION.

Respondent, Capitol Chevrolet Company, is filing a companion brief in opposition to the petition for writ of certiorari herein. While we rely on all matters therein contained, we specifically adopt and incorporate by reference the arguments therein contained to the effect that there is no jurisdiction in this Court to grant the petition for writ of certiorari.

THE GROUNDS STATED BY PETITIONER FOR GRANTING THE WRIT.

The grounds stated by petitioners as reasons for granting the present petition for a writ of certiorari seem to be three in number: first, that the decision of the United States Court of Appeals for the Ninth Circuit in the present case is erroneous; second, that that decision is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Gaynor v. Metals Reserve Co.*, 166 Fed. (2d) 1011 (8th C.C.A., 1948); and third, that a decision by this Court is of importance to the United States because of the possibility of similar litigation.

We propose to discuss these three grounds separately and to show that neither singly nor together do they constitute a valid reason for this Court to exercise its discretion by granting the petition for a writ of certiorari here. Furthermore, as set forth at length in the brief of respondent Capitol Chevrolet Company, there is a complete and total lack of jurisdiction to entertain or grant the petition for writ of certiorari.

THE DECISION BELOW WAS CORRECT.

Petitioners argue at some length that the decision below was erroneous, urging (Petition pp. 7-8) eleven separate specifications of error. We do not propose herein to answer these specifications at length or in detail. Not only does the majority opinion of the Court of Appeals answer them adequately, but a mere allegation of error in the decision of a Court of Appeals has never in itself been a ground for the issuance of a writ of certiorari by this Court. It is fundamental that the jurisdiction of this Court to review a judgment of a Court of Appeals by certiorari is a jurisdiction to be exercised entirely in the discretion of the Court, sparingly, and only in extraordinary cases of peculiar gravity and general importance, or in order to secure uniformity of decision. Mere allegations of error alone are not themselves a proper ground. We will, however, discuss briefly the entire correctness of the decision below.

It is undisputed that Defense Supplies Corporation was dissolved by the Joint Resolution of June 30, 1945, and that no action was ever taken to substitute Reconstruction Finance Corporation as a party within the twelve-month period limited in the Joint Resolution. The sole question involved is as to the effect upon the then pending action of that dissolution of the corporate plaintiff.

The dissolution of a corporation abates a pending action to which it is a party, in the absence of a statute providing authority for the survival of the action. This basic rule is so well established that not

even petitioners controvert it. It is fully discussed in *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, 71 L. Ed. 634 (1927), where Mr. Chief Justice Taft sets out the rule with great clarity. In *National Bank v. Colby*, 21 Wall. (88 U. S.) 609, 22 L. Ed. 687 (1874), this Court, in referring to the pendency of a suit against a dissolved corporation, stated that: "The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation." (In that case, oddly enough cited by petitioners (Petition p. 15), the Court found no such provision in the National Bank Act under which the bank was formed, and abated the action.)

It being clear that the dissolution of a corporation abates a pending action to which it is a party unless there is statutory authority for the survival of the action, and the dissolution of Defense Supplies Corporation being undisputed, the only remaining inquiry is as to the existence of any statutory authority for the survival of the action. The dissolution of the Defense Supplies Corporation was effected by the Joint Resolution of June 30, 1945. It is not even suggested by petitioners that there is any other statute which might authorize survival of the present action, and it is to the Joint Resolution of June 30, 1945 and to that legislative enactment alone to which we must look.

The Joint Resolution is as follows:

> "That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are

hereby transferred, together with all their documents, books of accounts, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.

Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

Sec. 3. This joint resolution shall take effect on July 1, 1945."

The Court of Appeals for the Ninth Circuit properly held that this Joint Resolution did not constitute statutory authority for the survival of the present action, in the absence of a timely motion for substitution under the terms of the Joint Resolution. Not only is this conclusion the only proper one under the terms of the resolution, but it is reinforced by many decisions of this Court and of the lower Federal Courts. It is to be noted that while this Court has never passed upon the joint resolution in question, this is not a question of first impression here, as this Court has passed upon a statute *in pari materia*, the Act of Congress of February 9, 1889, both in its original form and as amended by the Act of February 13, 1925 (28 U.S.C. Section 780). Indeed, this statute is supplemented and reinforced by Rule 19, Sec. 4 of the Rules of this Court.

The identity of the statutes is demonstrated in the opinion of the Court of Appeals (R. pp. 403-404) and need not be repeated here. Similarly, no further discussion is needed here as to the decisions of this Court and the lower Federal Courts holding that the parallel statute did not constitute authority for the survival of an action where there had been no timely substitution within the terms of the statute.

LeCrone v. McAdoo, 253 U. S. 217, 64 L. Ed. 869 (1920);

John Barton Payne v. Industrial Board of Illinois, 258 U. S. 613, 66 L. Ed. 790 (1922);

U. S. ex rel. Claussen v. Curran, 276 U. S. 590, 72 L. Ed. 720 (1928);

Black Clawson Co. v. Robertson, 71 Fed. (2d) 536 (C.A. D.C., 1934);

Martin v. Coe, 83 Fed. (2d) 606 (U.S.C.A.D.C., 1936);

Kuttroff v. Sutherland, 49 Fed. (2d) 944 (D.C., S.D. N.Y., 1931); affd. 66 Fed. (2d) 500 (2d C.C.A., 1933);

Becker Steel Co. of America v. Hicks, 1 Fed. Supp. 300 (D.C. S.D. N.Y., 1932); affd. 66 Fed. (2d) 497 (2d C.C.A., 1933);

Bowles v. Ohlhausen, 71 Fed. Supp. 199 (D.C., N.D., Ill., E.D., 1947).

Petitioners make some effort (Petition pp. 15-18) to avoid the clear effect of these cases upon the interpretation of the joint resolution in question, apparently upon the sole basis that the parallel statute refers to the separation from office of individuals while the joint resolution (using identical language) refers to the dissolution of corporations. It seems elementary, however, that where this Court has consistently interpreted the language of the earlier statute prior to the enactment of the joint resolution, the congressional intent in using identical language in the joint resolution clearly requires identical interpretation thereof. The Court of Appeals for the Ninth Circuit so held, and its holding is patently correct and in accord with the decisions of this Court.

Petitioners, in seeking authority for their strained construction of the language of the joint resolution, rely solely upon cases construing state statutes and upon the case of *Gaynor v. Metals Reserve Co.*, 166

Fed. (2d) 1011 (8th C.C.A., 1948). We will discuss the *Gaynor* case below, and it is clear that the interpretation of state statutes differently worded and drawn is hardly persuasive when opposed to decisions of this Court upon Acts of Congress identical in language with the present legislative enactment.

To summarize, it is undisputed that Defense Supplies Corporation was dissolved by the joint resolution of June 30, 1945, and that no motion to substitute Reconstruction Finance Corporation was made within the 12-months period delimited in the statute. It is clear that dissolution of a corporation abates pending litigation to which it is a party in the absence of statutory authority for its survival. This Court and the lower Federal Courts have consistently interpreted an Act of Congress identical in language with the joint resolution as inadequate statutory authority for the survival of an action. The Court of Appeals very properly followed these holdings of this Court and held that in the absence of timely substitution, the present action abated.

Petitioners' charge of error in that holding of the Court of Appeals is itself based upon two basic errors. Since these errors also appear to be the basis for the decision of the Court of Appeals for the 8th Circuit in the *Gaynor* case (discussed below), and for the rather emotional dissent of Judge Healy in the present case, they require brief comment here. First, petitioners fall into the major error of considering only a very small portion of the statute in question, hopefully ignoring the balance thereof; and secondly,

they persistently ignore the fundamental difference between a cause of action and a particular action brought upon that cause of action.

Petitioners assert that the Court of Appeals held the present action abated "notwithstanding the specific provision in the joint resolution that no suit theretofore commenced by or against DSC should abate by reason of its enactment." (Petition, p. 9.) Petitioners' assertion might have merit if the portion of one sentence of the Joint resolution upon which they rely stood alone, but it does not. Section 2 thereof does state:

> "* * * No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution * * * "

but this fragment, upon which petitioners rely, is but a part. The Joint Resolution continues:

> "* * * BUT *the Court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.* (Emphasis added.)

This portion of the sentence, which petitioners choose to ignore, provides a specific procedure to be followed within a specific time if the action is to survive the dissolution of the named corporations. The necessity of following that procedure within the time limited is

emphasized by the use of the word "but." If the section read that the action should not abate by reason of the enactment of the joint resolution "*and*" the Court, on motion, etc., might allow substitution, then there might be merit in petitioners' argument. But the section provides that the action should not abate "by reason of the enactment of this joint resolution, *but* the court, on motion, etc." filed within twelve months, showing necessity for the survival of the action, "*may* allow the same to be maintained" by the Reconstruction Finance Corporation. Clearly, in the absence of such motion within the period limited, the action will not survive.

Not only do petitioners ignore this portion of the Joint Resolution, but they neglect the language of command contained therein, which is relied upon by the Court of Appeals. (R. pp. 398-400.) The first section of the Resolution directs that the duties, etc., of the dissolved corporation "*shall*" be performed by the Reconstruction Finance Corporation, and the second section directs that that corporation "*shall*" assume all liabilities, etc. In this case the Reconstruction Finance Corporation failed completely in its express duty as commanded by Congress, and it is that failure which prevented the survival of the action.

Petitioners seek to avoid their failure to act within the twelve-months period by asserting that that limitation does not mean what it says. The Court of Appeals points out (R. pp. 401-402) that the limitation cannot be ignored, but petitioners (Petition, p. 14) suggest that the limitation applies to the basic right to

sue Reconstruction Finance Corporation rather than to substitution. Not only does this suggestion violate every rule of statutory construction, but it demonstrates again the second basic error upon which petitioners' arguments are based.

Petitioners suggest that abatement of this action will destroy the right or cause of action. To so suggest is to ignore the fundamental distinction between a cause of action and a particular action brought thereon. This distinction is pointed out in the opinion of the Court of Appeals (R., pp. 402, 409-411), and is discussed with great clarity by this Court in *Fix v. Philadelphia Barge Co.*, 290 U.S. 530, 78 L. Ed. 481 (1934). The Joint Resolution transfers the cause of action to Reconstruction Finance Corporation without reservation; it permits survival of a particular proceeding brought upon that cause of action if, and only if, Reconstruction Finance Corporation moves for substitution in the action within the twelve-months period, and shows a necessity for the survival of *that* action. The failure to so move within that time prevents the survival of the particular action, but it has no effect whatever upon the admitted right of Reconstruction Finance Corporation to bring a new suit upon the *cause* of action. The Court of Appeals here properly held the particular action abated by reason of the failure to move for substitution; it did not hold, nor could it, that the failure had any effect on the *cause of action* itself. Petitioners' failure to recognize this elementary distinction is the second basic fallacy upon which their arguments are based.

The decision of the Court of Appeals for the Ninth Circuit was entirely free from error, and petitioners' unsupported charges of error therein constitute no valid reason for this Court to grant a writ of certiorari.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE CITED DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners assert, as an additional reason for this Court to grant their petition for a writ of certiorari, that the decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Gaynor v. Metals Reserve,* 166 Fed. (2d) 1011 (1948).

We believe that while that decision is erroneous, the error of the Court of Appeals for the Eighth Circuit is not a compelling reason for this Court to grant a writ of certiorari here, as the cases may be reconciled, and review by this Court is not necessary to secure uniformity of decision.

Since error in the decision of the *Gaynor* case is certainly not by itself a ground for the granting of the petition herein, we will point out the errors therein only briefly. First, the Court therein ignores the elementary distinction between a cause of action and a particular action brought thereon (see *Fix v. Philadelphia Barge Co.,* supra.) Indeed, the Court states (p. 1015): "To preserve a cause of action is to preserve the right to prosecute that cause of action to

final judgment." Standing alone, that statement is correct, but the Court goes further and incorrectly assumes that the preservation of the right to prosecute a cause of action to judgment includes the right to prosecute a *particular* action. The Court apparently bases this erroneous assumption upon a South Dakota statute, and wholly ignores all reason and authority.

Second, the Court of Appeals for the Eighth Circuit does not mention or discuss any of the cases decided by this Court in construing a statute *in pari materia* (see supra, p. 9); and, like petitioners herein, it relies upon a portion of the Joint Resolution without any consideration of the compelling nature of the balance of that Resolution.

All of these errors are pointed out by the Court of Appeals in the instant case (R., pp. 411-412) in stating that it is not in accord with the *Gaynor* decision. Those errors, however, or the stated disapproval of that decision, are not compelling reasons for granting the petition herein, since the two cases are reconcilable and not in conflict.

The present case was commenced by Defense Supplies Corporation and was at all times being maintained by that corporation until its dissolution. The Joint Resolution dissolving that corporation commanded that Reconstruction Finance Corporation "shall" perform the duties of the dissolved corporations. In this duty Reconstruction Finance Corporation failed, and by reason of that failure the Court of Appeals held that the action abated. In the *Gaynor*

case, the action was against one of the dissolved corporations, and again Reconstruction Finance Corporation failed in its stated duty, and the Court of Appeals for the Eighth Circuit held that it could not take advantage of that failure.

Erroneous though the *Gaynor* decision be, it is not on its facts in conflict with the present decision, and hence there is no compelling reason for this Court to grant the petition for a writ of certiorari in order to secure uniformity of decision.

THERE IS NO SHOWING OF IMPORTANCE TO THE UNITED STATES BECAUSE OF OTHER LITIGATION.

In conclusion petitioners argue (Petition, pp. 19-20) that a decision by this Court is important to the United States because a considerable body of litigation was pending on July 1, 1945, by and against the corporations dissolved by the Joint Resolution of June 30, 1945. Petitioners argue, without any support either within or without the record, that in some of these illusive cases counsel for the Reconstruction Finance Corporation *may* have failed in their duty under the Joint Resolution to move for substitution within the time limited, and that consequently there *may* be cases in which an effort will now be made to re-open such litigation after final judgment.

Without entering into a discussion of the effect of such a motion upon a judgment which has become final, we wish only to observe that not only is there no

showing of the existence of any such actions, but that we are unable to place credence in the thesis that attorneys for the Reconstruction Finance Corporation have been generally so grossly negligent as to fail in their clear duty under the Joint Resolution of June 30, 1945. That counsel have not been so negligent in their duty is shown in cases such as *The Kongo,* 155 Fed. (2d) 492 (6th CCA 1946) and *Atlantic Meat Co. v. R.F.C.*, 155 Fed. (2d) 533 (U.S.E.C.A., 1946), where timely motions for substitution under the Joint Resolution were made and granted.

Not only have petitioners failed to make any showing that there is pending litigation dependent upon a decision of this case by this Court, but their suggestion of the existence of such litigation is based solely upon the wholly improper assumption that counsel for the Reconstruction Finance Corporation in other cases have been negligent and derelict in their clear and express duty under the Joint Resolution. An argument based upon such assumption is hardly appealing as a ground for granting the present petition for a writ of certiorari.

CONCLUSION.

It is respectfully submitted that petitioners have shown no valid reason why this Court should exercise its discretion and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit. That decision was correct and was not in conflict with the cited decision of the United

States Court of Appeals for the Eighth Circuit, and the matter is not one of sufficient importance to require review by this Court. Furthermore, as set forth at length in the Brief of Respondent Capitol Chevrolet Company, petitioners have wholly failed in their burden of showing jurisdiction in this Court to entertain or grant the petition for writ of certiorari.

Dated, San Francisco, California,
October 25, 1948.

Respectfully submitted,
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